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No. 82-239

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-239

JOSEPH ARTUSO and JOHN ARTUSO,

Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND DEPARTMENT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Pursuant to Rule 22 of the Rules of this Court, the respondent submits this brief in opposition to the captioned petition for a Writ of Certiorari.

Preliminary Overview

The petitioners were convicted, upon their pleas of guilty entered in the County Court, Westchester County, on October 8, 1980 (Joseph Artuso) and October 10, 1980 (John Artuso), of the crime of Criminal Contempt in

the First Degree. By a decision and order dated December 9, 1980, the Honorable Aldo A. Nastasi, County Court Judge, denied a joint motion to withdraw said guilty pleas. On December 11, 1980, the petitioners were sentenced to an indeterminate term of imprisonment with a maximum of four years. On April 19, 1982, the Supreme Court of the State of New York, Appellate Division, Second Department, modified the judgment of conviction by reducing the sentences imposed to definite sentences of imprisonment of one year, and, as modified, unanimously affirmed the judgments and remitted the matter to the County Court, Westchester County, for further proceedings. Thereafter, leave to appeal to the New York State Court of Appeals was denied. (Bernard S. Meyer, Associate Judge). In accordance with the aforementioned decision, the petitioners were resentenced on July 19, 1982, in the County Court, Westchester County, to definite sentences of imprisonment of one year.*

Facts

On September 2, 1980, the petitioners appeared, under subpoena, before a Westchester County Grand Jury investigating a homicide which had occurred on May 11, 1980 outside of a Hartsdale discotheque known as "Fudgies Too". Specifically, Assistant District Attorney Bruce Bendish sought to elicit information from the Artuso brothers concerning the actions of Bradford Wedra, the target of the investigation, with regard to the victim of the homicide, Giampierro Molle. Joseph Artuso was called first. From the outset, the witness was uncooperative. Upon a refusal to answer questions posed by the prosecutor, the witness was informed that he was not a target of the investigation, that he had been given immunity for his testimony, and that the only crimes he could

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* An application for a stay of judgment was denied by this Court on July 20, 1982 (Marshall, J.).

be charged with on the basis of his testimony were perjury (if he testified falsely) and contempt (if he refused to answer). The witness nonetheless persisted in his refusal, at which point the prosecutor asked if he desired to step outside and speak to an attorney. The witness indicated that he did not care to confer with an attorney, and was excused.

Thereafter, John Artuso was called to the stand and similarly refused to answer questions, despite the prosecutor's explication of the principle of immunity and the crime of contempt. The witness was then excused, and the brothers remained in the waiting room for approximately two hours, while the Grand Jury proceeding contined. Assistant District Attorney Bendish had instructed them to do whatever they felt necessary and call an attorney or whomever else they desired in the interim. The prosecutor was informed at that time by both Artusos that neither wanted to confer with counsel.

Approximately two hours later, the petitioners were recalled (separately) as witnesses. Although Assistant District Attorney Bendish reiterated that the witness was obliged to answer and would receive immunity for his testimony, explained the consequences of refusal (to wit: a possible indictment for Criminal Contempt which, upon conviction, could result in a four year State's prison term), and repeated the purpose of the Grand Jury's investigation, the petitioners remained steadfast in their refusal to answer *any and all* questions.

That same day, the petitioners were charged, by separate indictments, with the crime of Criminal Contempt in the First Degree. Arraignment was scheduled for October 6, 1980, at which time both defendants, appearing *sans* counsel, were apprised of the charges against them and advised of their right to be represented by an attorney.*

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* The Honorable John C. Couzens, the presiding judge, unequivocally informed the defendants that the assistanse of counsel was necessary.

An adjournment to October 8, 1980 was granted for the procurement of counsel*, and the bail was set at $5,000. Paul Victor, Esq., had previously contacted the District Attorney's Office, stating that he was acting on the defendants' behalf at the request of the Artuso family, and was given a copy of the indictment. However, after Joseph and John Artuso stated that they did not wish Mr. Victor to represent them, he was relieved.

John Farrauto, Esq., appeared on behalf of both defendants on October 8, 1980, again at the request of the Artuso family and offered to provide *pro bono service*. However, this attorney was also relieved at the insistance of the defendants. On this date, both defendants indicated their intention to plead guilty *sans* an attorney, although the Court indicated there were attorneys available in Court that would represent them. After a conversation with Assistant District Attorney Bendish, in which the prosecutor strongly advised the defendant to consider having the assistance of counsel in this matter, John Artuso agreed to an adjournment of his case until October 10, 1980. Joseph Artuso, however, remained adamant in his decision to forego counsel and plead guilty. After a representation by Mr. Farrauto that "the defendant advised me he does not wish to have an attorney, even *pro bono*," Joseph Artuso was extensively *voir dired* and entered a plea of guilty as charged.**

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* At no time was there any indication by either defendant that the length of the adjournment was inadequate.

** The Court again informed the defendant on the record that he was entitled to be represented by an attorney and that the proceedings could be adjourned for the purpose of securing the services of an attorney. The defendant recognized his rights and explicitly stated he had had an opportunity to speak to an attorney and declared his intent to plead guilty without an attorney, mindful of the fact that the crime was an E felony punishable by a maximum of four years state's prison term.

On October 10, 1980, John Artuso appeared in Court and stated that he did not wish to avail himself of the services of an attorney, and wished to plead guilty. The defendant indicated that he was aware he was waiving his right to a trial and admitted to the facts set forth in the indictment.

Prior to entering their respective guilty pleas, each of the defendants spoke to at least three attorneys, declining to accept representation and never indicating that they were dissatisfied by the selection and wished further time in which to obtain a different attorney.*

POINT ONE

The petitioners knowingly and voluntarily chose to proceed without counsel; their constitutional rights were in no way abbrogated.

At no stage of the proceedings herein did the petitioners request the assistance of counsel. Indeed, they persistently refused to even confer with an attorney. Now, petitioners in essence contend that their right to counsel was violated because counsel was not forced upon them. The suggestion is absurd.

The petitioners were called before the Grand Jury as mere witnesses, each under a grant of immunity. Thus, no fifth amendment privilege against self incrimination is involved. They were not the "target" of the Grand

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* At the October 6, 1980 proceedings, Joseph Artuso specifically asked for an adjournment to October 8, 1980 for the purpose of obtaining an attorney. On October 8, 1980, he emphatically stated that he did not want an attorney, nor did he wish additional time to reconsider his intent to plead guilty without counsel. Similarly, John Artuso (after being granted a second adjournment on October 8, 1980 to October 10, 1980 for the purpose of securing counsel) explicitly expressed his desire to proceed *pro se*.

Jury's probe. There was no attempt to "ensnare" the witnesses: the prosecutor's sole purpose was to elicit information relevant to a homicide investigation. Nonetheless, the petitioners refused to answer any and all questions; they did not challenge the pertinency of particular questions. (Compare, *Matter of Additional January 1979 Grand Jury* v. *Doe*, 50 N.Y. 2d 14). Nor did they ever request to confer with an attorney (see, *People* v. *Ianello*, 21 N.Y. 2d 418, 425, *cert. denied*, 393 U.S. 827); but, rather, refused the opportunity to do so.

Thereafter, the petitioners, steadfast in their rejection of counsel, knowingly and voluntarily entered guilty pleas. It is beyond cavil that an accused has a constitutional right to proceed *pro se* when he voluntarily and intelligently elects to do so. (*Faretta* v. *California*, 422 U.S. 806; *People* v. *McIntyre*, 36 N.Y. 2d 10; *People* v. *Medina*, 44 N.Y. 2d 199). When the petitioners so determinedly and unequivocally insisted on rejecting counsel and proceeding *pro se*, the court had no recourse but to permit them to do so; "that it might have been inadvisable for (them) to act as (their) own lawyer did not destroy the right to make a calculated decision to do so." (*People* v. *Medina*, *supra* at 210).

Nor does the denial of the motion to vacate the previously entered guilty pleas, which rests squarely within the sound discretion of the trial court (McKinney's New York Crim. Pro. Law § 220.60(3)), implicate or violate any constitutional safeguards.

POINT TWO

A one year sentence of imprisonment, imposed pursuant to a conviction of the Crime of Criminal Contempt, does not constitute cruel and unusual punishment in contravention of the Eighth Amendment.

The petitioners' contumacious conduct in refusing to cooperate with a Grand Jury investigating a homicide constituted the serious crime of Criminal Contempt in the First Degree*; for which they are presently serving one year prison terms. This Court has consistently held that the Eighth Amendment applies only where the punishment is "grossly disproportionate to the severity of the crime." (*Weems* v. *United States*, 217 U.S. 349; *Coker* v. *Georgia*, 433 U.S. 584, 592). The power to strike down punishments as excessive is to be exercised with great circumspection and only in extraordinary cases. (See, *Rhodes* v. *Chapman*, 452 U.S. 337; *Furman* v. *Georgia*, 408 U.S. 238, 414 (dissenting opinion, Powell, J.), rehearing denied 409 U.S. 902). Challenges to the duration of the sentence have oft been rejected. (See, *Pervear* v. *Massachusetts*, 5 Wall 475; *Howard* v. *Fleming*, 191 U.S. 126; *Badders* v. *United States*, 240 U.S. 391). The case at bar presents no issue of cruel and unusual punishment.**

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* Said offense is classified as a Class E Felony (McKinney's New York Penal Law, § 215.51, punishable by a maximum of four years imprisonment (McKinney's New York Penal Law, § 70.00(2)(e)).

** This Court has rejected such a challenge to a civil contempt conviction pursuant to which the offender was to be imprisoned indefinately, until he complied with the court order he had flouted. (*Uphaus* v. *Wyman*, 360 U.S. 72; rehearing denied, 361 U.S. 856).

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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